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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1936**

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# No. 660

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ELBERT B. LINDSEY AND E. R. LINDSEY,
*Petitioners,*

*vs.*

STATE OF WASHINGTON.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT THEREOF.

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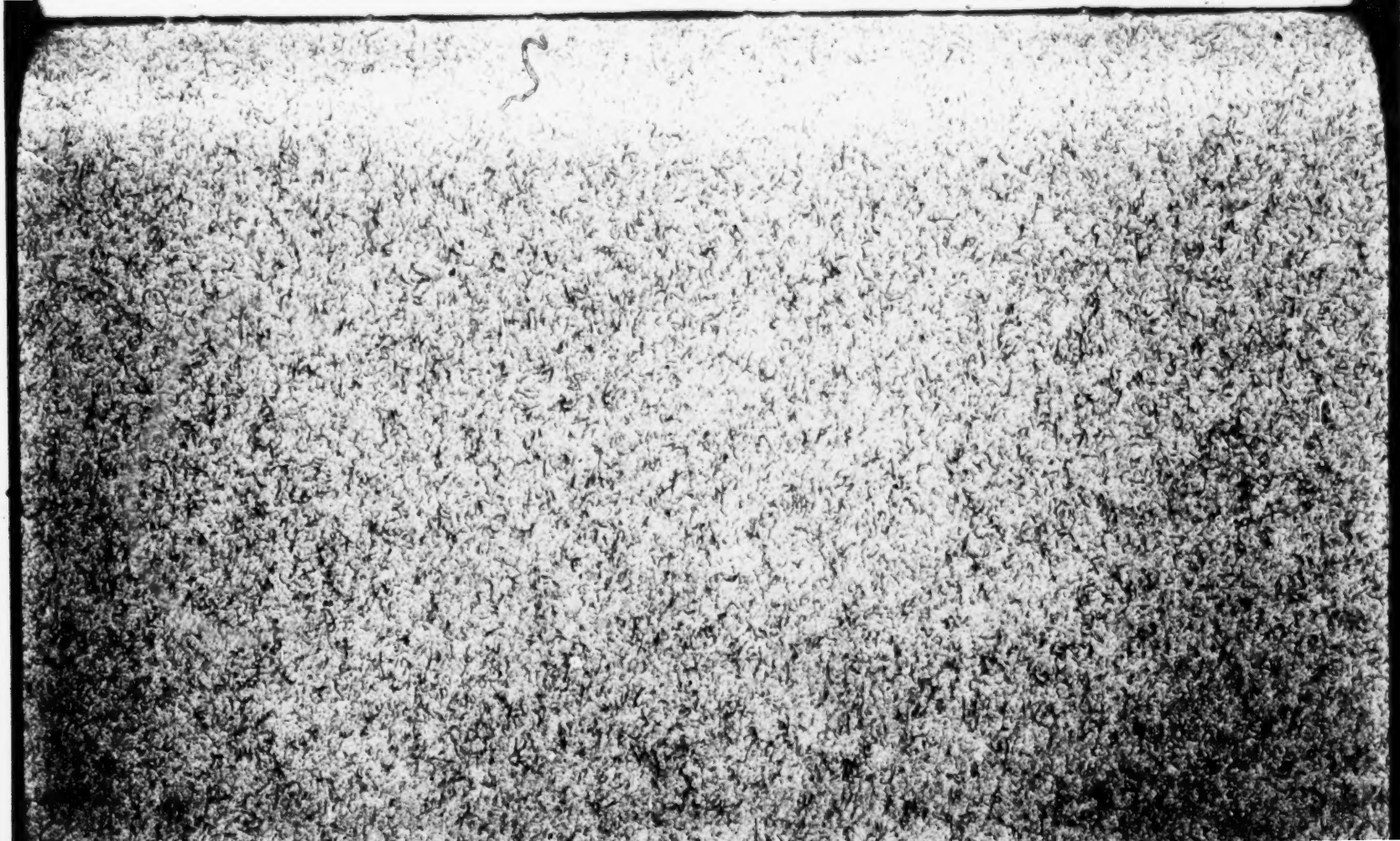
ELBERT B. LINDSEY,
*Pro se.*
E. R. LINDSEY,
*Pro se.*



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# SUPREME COURT OF THE UNITED STATES

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## No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
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*vs.*

STATE OF WASHINGTON.

## PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners respectfully show to this Honorable Court:

I.

This petition is prayed for in order that this Court may grant a review of a final decision of the Court of last resort of the State of Washington, and to set aside the decision of said Court (Opinion, R. 87-92) (Remittitur, R. 76).

It is first contended that the sentences (terms of imprisonment) of "Not more than 15 years" (R. 50, 51) of the Superior Court of Spokane County, Washington, and affirmed by the said Supreme Court, are void, as being awarded under a law, passed after the commission of the alleged offense, and which changed the condition of petitioners to their disadvantage, and increased the term of their imprisonment; changed the fixing of their sentences

from a judicial tribunal to a ministerial board, and orders petitioners sent to a penal institution, with only a general sentence; the term of their imprisonment not being fixed until some time within six months after petitioners are received at the penal institution, and then fixed by the said ministerial board, and the law not providing for any "fixing of sentence" so long as petitioners remain in the County Jail, while their case is on appeal, although if so confined their sentence commenced at the date of the judgment and sentence; and said law providing, in certain instances, their terms may be extended beyond that set out in the statute denouncing the offense.

Petitioners presented this question to the said Supreme Court by assignment of error (R. 63):

> "The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an *ex post facto* law, being in direct violation of Section 10, of Article 1, of the Constitution of the United States: No state shall • • • pass any • • • *ex post facto* law."

And the said Supreme Court, in its opinion (R. 91-92) said:

> "We are obliged to conclude that chapter 114, Laws of 1935, p. 308, does not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws."

On September 3, 1935, the Prosecuting Attorney for Spokane County, Wash., charged petitioners, by substitute information (the first information was filed May 3, 1935) (R. 1) with the alleged crime of Grand Larceny, as follows:

> "That the said defendants, Elbert B. Lindsey and E. R. Lindsey in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlaw-

fully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

" 'Spokane, Wash., Apl 15, 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey $40.00.
Forty 00 - - - - Dollars.

E. R. LINDSEY.'

"and endorsed on the back thereof: Elbert B. Lindsey, 1104½ W. 2nd Ave., Co. Service National Guard: obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America, of the value of forty dollars, and the property of the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

This information was brought under Rem. Rev. Stat. of Washington, set out in the instructions (R. 44) as follows:

"You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color or aid of any order for the payment or delivery of property or money of any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Said section being a section (2) of Rem. Rev. Stat. 2601, Larceny, #349.

There was also in force and effect at all times in this State, Rem. Rev. Stat. 2605, Grand Larceny, #353:

"Every person who shall steal • • • in any manner specified in section 349 of this Act:

(5) Property of the value of more than twenty-five dollars, in any manner whatever—

> Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years."

A trial was had on Sept. 12, 1935, on the information herein set out (R. 1).

> (R. 3) "Be it remembered, That heretofore and to-wit, on the 12th day of September, A.D., 1935, the above entitled cause came on for trial on the pleadings heretofore filed herein—."

A joint verdict of "GUILTY as charged in the information" was returned on "this 14th day of September, 1935." (R. 49.)

And E. R. Lindsey was sentenced for "a term of not more than Fifteen years." "Done in open court • • • this 1st day of November, 1935." (R. 50.) And the same sentence, of the same date, as to Elbert B. Lindsey (R. 51).

On April 15, 1935 (the date of the alleged commission of the offense charged) there was in force in the State of Washington, a law Rem. Rev. Stat. Sec. 2281, Indeterminate Sentences, #29:

> "Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the State Penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

There was also in effect on said date, April 15, 1935, the following statutes of the State of Washington, Rem. Rev. Stat. Sec. 2190, Judgment, #1114-352:

> "After verdict of guilty, or finding of the court against the defendant, if the judgment be not arrested, or a new trial granted, the court must pronounce judgment."

Rem. Rev. Stat., Sec. 2196. Defendant must be personally present. #1115-353.

> "For the purpose of judgment, if the conviction be for an offense punishable by imprisonment the defendant must be personally present • • •."

Rem. Rev. Stat., Sec. 2172. Court shall fix punishment. #1103-311:

> "When the defendant is found guilty, the court and not the jury shall fix the punishment to be inflicted."

On June 12, 1935 (after the date of the offense charged), a new law went into effect in the State of Washington, being Chapter 114, Laws of Washington, 1935, p. 308, which in terms repealed Rem. Rev. Stat., Sec. 2281, the Indeterminate Sentence Law, and in Sec. 1 (Rem. Rev. Stat., Sec. 10249-1), created a "board of prison, terms and paroles" to administer the Act.

Sec. 2 of said Act (Rem. Rev. Stat., Sec. 10249-2) provides:

> "When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary • • • and shall fix the maximum term of such person's sentence only.
>
> "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which

such person was convicted, if the law provides for a maximum term • • •.

"If the sentence of a person convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary • • • to receive such person • • • and to imprison him or her until released under the provisions of this act or through the action of the governor.

" • • • It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, shall be the duration of such convicted person's imprisonment.

"Within six months after the admission of such convicted person to the penitentiary • • • the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

"When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the Supreme Court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court. • • •

"Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense for which such person was convicted • • •."

Sec. 3 of said Act (Rem. Rev. Stat. 10249-3) provides:

"To assist in fixing the duration of a convicted person's term of confinement • • • " (the board shall do certain things therein enumerated, and not material here).

Sec. 4 of said Act. (Rem. Rev. Stat. 10249-4) provides among other things:

> "the board • • • shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion." • • •
>
> "From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.
>
> "The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof."

Sec. 3 of said Act further provides:

> "Every prisoner who has a favorable record of conduct at the penitentiary • • • and in whose behalf the superintendent • • • shall file a report • • • shall upon, but not until the adoption of such recommendation by the board • • •, be allowed time credit reduction from the term of imprisonment fixed by the board • • •."

Sec. 4 of the Act also provides:

> " • • • in no case shall the inmate be credited with more than one-third of the sentence as fixed by the board."

Petitioners claim that their sentences being for a flat term of "not more than fifteen years" and without a minimum being fixed as provided by R. R. S. Sec. 2281, shows plainly that they were sentenced under the provisions of this enactment of 1935; that by that enactment and the repeal of Sec. 2281, their condition was changed to their

disadvantage after the date of the alleged commission of the offense; that their terms of imprisonment were lengthened; that the discretion to fix the sentences was taken from judicial authority and placed in a ministerial board; that if the "term" is to be fixed some time within six months after they enter the penal institution, that they are being subjected to and will be subjected to a long term of imprisonment, *without serving it under any definite term of imprisonment being as yet fixed,* and yet, *they are ordered delivered into the custody of the authorities for final imprisonment.* This was not the law on April 15, 1935, and such sentence as pretended to be imposed, is *ex post facto* and void.

II.

The second contention rests upon the ground that all the proceedings had in this case were violative of those principles of justice that are ranked as fundamental; that the action of the state, by its agents, was contrary to the fundamental principles of liberty and justice and that the whole proceeding was a wrong so fundamental that it was a mere pretense of a trial and rendered the conviction and sentence wholly void, under the rights guaranteed to petitioners under the V, VI, and XIV amendments to the Constitution of the United States.

This was done by the State by the following unlawful methods:

(a) By coercing one of the defendants, Elbert B. Lindsey, and compelling him to give evidence against himself, not when called on the witness stand, but in a "star" chamber proceeding:

> (R. 20.) (By Quackenbush for the State:) "Q. Isn't it true that I had charge of most of the questioning over there at the station? A. Yes." (His name, Quackenbush, is also endorsed on the written statement States Exhibit 2, R. 49.)

"I am 25 years old." (R. 18.) "He was ill and under the doctor's care for some time." (R. 17.) "At the time Elbert was examined he was in jail." (R. 12.) "We had both the father and son in custody on the 17th." (R. 12.) "At the time Elbert was arrested we did not have any warrant for him." (R. 12.) "I didn't file any complaint against the son. Elbert never had any hearing in police court as far as I know." (R. 12.) "Elbert had been confined right around two days before we showed him the check." (R. 15.) "Did they tell you (Elbert) what the charge was against you? A. Not specifically." (R. 19.) "Q. (By Quackenbush, Deputy Prosecutor for State): "This state's exhibit No. 1, is the check we were 'quizzing' you about? A. Yes." (R. 21.) "At no time during the examination by police officers or by Mr. Quackenbush was his father or mother present." (R. 12.) "Yes, we had two or three talks with him." (R. 15.) "I think I was down there (in the quizzing room) about five times and then taken back to jail." (Elbert R. 18.) "Captain McCarry said: 'I will throw you back in the cell'." (R. 22.) "They said to me, there is five to one against you and when you get into court if you don't sign it it will be used against you." (R. 21.) "And they said it didn't make any difference whether I signed it or not 'we will gang up on you in court and there is five of us to one of you." (R. 21.)

(R. 21.) (Question by Quackenbush:) "Was it in my presence or out of my presence that you say that you requested three or four times for an attorney? A. It was in your presence."

"Well, I got tired of fighting them for two days, and I decided that I would sign it." (R. 22.) "I asked three or four times for an attorney to be present so I would be represented, but I was refused." (R. 19.)

"Q. (By Quackenbush to Elbert:) Now I show you state's exhibit No. 2 for identification and ask you to examine and state what that is?

A. That is my signature. Q. Read it over? A. I signed it for the reason that I was brought down there

and it was shown me and I read it and I told you it was not what I said, but they said to me 'there is five to one' against you and when you get into court if you don't sign it it will be used against you." (R. 21.) "It is not what I said, but somebody said 'there is five against one and it didn't make any difference whether I signed it or not, as we will go into court and testify against you anyway.' " (R. 21-22.)

This Exhibit No. 2, the statement was introduced against both defendants, without limitation (R. 22) and is found set out in record at (R. 37-38).

This matter was raised in the Supreme Court of the State, and that Court disposed of it as follows (R. 89):

(1) The first assignment of error is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the Constitution of the United States and of this state.

From the evidence, it cannot be said that as a matter of law there was duress; but, in any event, Rem. Rev. Stat., paragraph 2151 (P. C. paragraph 9217), provides:

"The confession of a defendant made under inducement with all the circumstances, may be given as evidence against him, except when under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

Certainly, the record discloses much corroborating evidence to sustain the admissibility of the written admissions.

The question of such proceedings being in violation of the Constitution of the United States was avoided, and is yet undetermined.

The said Quackenbush, prosecutor, having thus procured all he could "extract" by coercion, then proceeded to his next step in endeavoring to obtain a void and illegal conviction of petitioners in this case, as follows:

(b) That he prepared by his own act and secured *by his own act* illegal and void judgments of convictions of petitioners which he might and did use to impeach petitioners in this case before they could have them set aside, by the following means:

That on May 3, 1935 (R. 66), the said Quackenbush filed two criminal informations against petitioners; the one being the one at bar (in which a substitute information was afterwards filed), and the other being a charge of "Attempted Grand Larceny", the offense alleged to have been committed on or about April 17, 1935. This information—known herein as case No. 11045-25867—was brought under the same State statutes hereinbefore set forth, with the additional fact that it was called an "attempt" and the State laws provided a penalty of "one-half of that for Grand Larceny."

This case, No. 11045-25867 was brought on for trial on June 12, 1935—the morning after the new law, Chap. 114, Laws of 1935, went into effect and the R. R. S. Sec. 2281 had been repealed. A verdict of guilty was secured, and judgments and sentences entered against each of petitioners with a sentence of "not more than seven and a half years" (R. 38, 40). (Exhibits 3 and 5 in this case.)

These sentences were illegal and void under Article 1, Section 10, of the United States Constitution, under the same conditions as urged as to the sentences in the case at bar, heretofore (without repeating).

But said Quackenbush, for the State did not stop there;

in order to obtain that conviction he stated to the trial jury of and concerning petitioner E. R. Lindsey (R. 71):

> "But so far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform."

and of and concerning Elbert B. Lindsey (R. 71):

> "If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much greater crime that we could have charged him with than this; one that he might have been charged with and much more easily convicted; this is just a small matter."

The said Quackenbush knowing at the time that his statements were false and untrue, and his statements were in fact false.

The false and fraudulent and illegal and void judgments and sentence so obtained by said Quackenbush, were the identical judgments and sentences used as Exhibits No. 3 and 5 (R. 38, 40) as against Elbert B. Lindsey (R. 22-23) and as against E. R. Lindsey (R. 31-32).

That the said Quackenbush used said judgments and sentences on Sept. 12-13, 1935, for impeachment, and before petitioners could have them set aside.

That said convictions, judgments and sentences were set aside by the Supreme Court of Washington, by an opinion of date January 10, 1936, found—*State* v. *Lindsey*, 185 Wash. Rep. at 206, 52 Pac. (2d) 1246, on the ground as stated in the decision of "misconduct of state's counsel." The same counsel, Quackenbush, who conducted the case at bar.

After said judgments and sentences were set aside petitioners moved in the State Supreme Court (R. 65, *et seq.*) to arrest the present judgments on the ground of such re-

versal of the former judgments used for impeachment (R. 65) as follows:

> "The affirmance by this court on Aug. 20, 1936, Vol. 87 Wash. Dec. 298, and thereby directing that the defendants, and each of them be deprived of their liberty by the State of Washington, for a term of 15 years, is a direct denial of the rights of the defendants, as guaranteed to them by the VI and XIV amendments to the Constitution of the United States • • •."

And further such decision, in the words of this Supreme Court of Washington, as announced in *State* v. *Harrass*, 22 Wash. 57, 60 Pac. 58:

> "It would be a shame and a reproach to the law to hold the defendants accountable for the law's mistakes."

In that the defendants and each of them were in all substantial effect, and in contemplation of the laws and Constitutions mentioned:

1. Each defendant denied the right to testify in his own behalf.

2. Each defendant denied the right to call witnesses in his own behalf.

3. Each defendant was denied a fair and impartial trial (R. 65).

That the defendants and each of them are denied the rights guaranteed to them by the 14th Amendment to the Constitution of the United States, by this Supreme Court failing, neglecting and refusing to pass upon the question fairly presented to them in this case as to the rights of the defendants under the laws and Constitutions, when as in this case, although as the court announced in its decision that the impeachment and annulment of the testimony of defendants, and their witnesses by the introduction of the

records of a previous conviction of a felony was without error by the trial court, of the effect on the rights of the defendants, when, before final decision in this court, and while the jurisdiction is solely in this court, this court renders a decision that the same previous convictions used for impeachment and annulment of testimony, *were illegal*, and obtained by misconduct of the Prosecuting Attorney (the same one who tried this case).

This motion was denied, without opinion (R. 75).

That thereupon, and after the remittitur was returned to the Superior Court, petitioners moved (R. 76, *et seq.*) the Supreme Court for leave to the Superior Court to re-open, so as to allow petitioners to show the fact of the reversal of the judgments used for impeachment, in which motion it was stated:

> (R. 77) "And by reason of which defendants and each of them were denied a fair trial as guaranteed by the XIV amendment to the Constitution of the United States, and in contravention of the said constitution • • • and in all substantial effect wrongfully and illegally deprived defendants, and each of them of their right to testify in their own behalf, they so offering themselves, and denied them the right to call witnesses, by reason of what is sometimes called a mistake in law, for which the defendants or either of them were in no way responsible, and for which the State of Washington alone was responsible, in that at the time of trial, defendants took the witness stand and called each other as witnesses, and that the State of Washington offered in evidence and read to the jury, and put in evidence, a certified copy of a previous conviction of each of the defendants on a felony charge, exhibits 3 and 5, in cause No. 11045 of the said Superior Court, No. 25867 of this Supreme Court, for the purpose of impeaching the testimony of defendants and each of them, and it did have such effect; that thereafter and to-wit, on January 10, 1936, and after the jurisdiction of this

case was in the Supreme Court, this Supreme Court reversed and set aside said judgments of conviction in said cause No. 11045-25867.

That it is very material for defendants and their rights under the Constitution of the United States and of this State to be afforded an opportunity to present the fact before some court that the said judgments so used for impeachment were set aside; that under the practice of this state, the trial court is the only court that can hear such evidence; that the said Superior Court is without jurisdiction to do so unless such permission is granted by this court; that the final judgment has now been entered by this court, and returned to the Superior Court, and that it is but natural and proper justice that defendants be afforded an opportunity to present the facts above set out to the Superior Court of Spokane County, Washington, and that this court grant permission for such to be done."

This motion was supported by affidavits (R. 78-86).

This motion to re-open was denied without opinion (R. 86).

Petitioners' testimony in this case in their own defense has always been burdened with the illegal and unlawful aspersions cast upon it by the use of the illegal and void sentences, Exhibits 3 and 5 (R. 38, 40) *and petitioners have at all times been denied the right to show this fact in any judicial tribunal of this State.*

Petitioners have been denied by the Supreme Court of the State of Washington, their most valued fundamental right, of being accorded a trial in which they were allowed to defend themselves when assailed in court by the State, and not through any fault of their own but solely and alone by the illegal acts of the State of Washington, by its agent the said Quackenbush, acquiesced in by the Supreme Court.

*Petitioners have never yet had a trial.*

Petitioners speak of the judgments being illegal and the sentences being void (*i. e.*, the ones used for impeachment)

and this applies as well to the ones at bar, for such sentences have been held void by the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Wash., in a case involving the enactment of 1935, Chap. 114, Laws of Wash. 1935, in the case of *Andrus* v. *McCauley et al.*, Cavanah, District Judge, No. L. 1421, Nov. 21, 1936. (As the opinion is long but bears directly on the question a full copy is appended to brief.)

(c) That petitioner Elbert B. Lindsey had been denied the assistance of counsel by the State at the time that the said Quackenbush, Prosecutor, conducted his "quizzing" and coercion, as hereinbefore set out at page 8-10.

He had been arrested on April 17, 1935, as set out *supra*, and at the time of the trial, September 12, 1935, the testimony of police officers was: (R. 15) "I don't know as they have ever been out of jail since then" (April 17, 1935).

When Elbert B. Lindsey was brought in for trial on the 12th of September, 1935, he again demanded counsel, and finally, just as the case started (R. 3) counsel was appointed for him; he then objected to proceeding by reason of the fact that he was not allowed to consult with counsel or prepare his defense, but this objection was overruled, and the trial ordered to proceed. (See also opinion of Supreme Court (R. 88) to the same effect.)

This was a denial of the rights guaranteed to him under the VI Amendment to the Constitution of the United States, that he should have the assistance of counsel for his defense.

(d) At the trial Peter M. Jacoy, the party whom it was alleged paid the money on the check, was called and testified (R. 4):

> "It must have been between the 15th and 16th of April but I would not say which one of those dates, I saw that gentleman over there (indicating Elbert B. Lindsey) at 402 Sprague Avenue at my place of business.

He came in and wanted the clerk to cash the check and the clerk turned this over to me • • • I had seen him in there previously and knew him by sight, and so I went ahead and cashed the check."

The charge in the information (R. 1) was

"That the said defendants, Elbert B. Lindsey and E. R. Lindsey • • • did • • • obtain from Peter M. Jacoy $40.00."

The State and defense both rested (R. 35) and the following proceedings were had (R. 35):

"Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of the defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in the case would not warrant a verdict of guilty against this defendant."

And a separate motion to like effect was made as to Elbert B. Lindsey (R. 36).

The trial court then, on the advice of the prosecutor, Quackenbush, attempted to, and did charge, defendants, and

especially E. R. Lindsey, with another offense, one not charged in the information, and one, if charged at all, which would require additional allegations of fact in the information, prior to defendants being put upon trial; and in substantial effect charged petitioners with *two* offenses—that is, gave to the trial jury two offenses—one charged in the information, and one not so charged—to consider against petitioners, by the following means (R. 44):

> "You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601-2), provide as follows:
>
> "Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

> "Every person who with intent to deprive or defraud the owner thereof • • • shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

This last statute, 2601, sub-div. 2, was the one under which the information (R. 1) was drawn.

The first statute 2601-2, requires additional allegations in the information, *which were never charged in any information in this case*, to-wit:

(1) That some particular person drew the check.

(2) That it was delivered to some person, and

(3) That it was drawn on a bank or depository for the payment of money.

Then the court charged the jury as to E. R. Lindsey (R. 44-45).

You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

> "(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein."

*There was no such charge in the information* (R. 1).

> (2) "That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person, or persons."
>
> (3) "That at the time of the making and delivery, if any, said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation."

*There was no charge in the information that the so-called check was drawn on a bank or depository for the payment of money.*

And as a matter of fact the document shows on its face that it was drawn on "a trust company" which is not prima facie a bank or depository for the payment of money, and neither was there any evidence in the case that it was a "bank."

"(R. 45) "If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information."

(But those elements were not charged in the information.)

"If, on the other hand, the State has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant, E. R. Lindsey."

So if the jury found all the elements charged by the instructions against E. R. Lindsey, *it was proof without allegation,* and on which E. R. Lindsey could not be convicted.

It was a charge to the jury to acquit E. R. Lindsey, and in law he must have the benefit of it. He was acquitted, notwithstanding the verdict to the contrary.

The court then further charged the jury (R. 46):

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn."

*Again a charge without allegation in the information.*

Then the court charged the jury as to Elbert B. Lindsey under the allegations in the information (R. 45-46) and under R. R. S. Sec. 2601 sub-div. 2, set out *supra.*

And then charged the jury (R. 46):

"If the state has established these charges as to each of the defendants herein by the evidence in the case beyond a reasonable doubt, then you should convict the said defendants."

That is to say on a joint charge in the information (R. 1) and under a charge to the jury of one set of facts and law

not charged in any information, find E. R. Lindsey guilty, and on a different set of facts and law find Elbert B. Lindsey guilty, *then find them jointly guilty of the offense charged in the information.*

This question was raised by assignments of error in the Supreme Court of Washington (R. 52-60) and at (R. 58) as follows:

> "This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV Amendments to the Constitution of the United States."

And again at (R. 60) in speaking of the instructions:

> "This was in plain violation of the rights of the defendants under the Constitution of the United States and of this State, as to "due process."

The State Supreme Court disposed of the matter in its opinion (R. 90), as follows;

> (7) "The trial court is criticized because of its instructions relative to Rem. Rev. Stat. Par. 2601, sub. (2) and 2601-2 (P. C. Paragraphs 8944, 8887). Each of these sections defines a crime by the fraudulent issuance or passage of a check. The acts of the defendants complained of in the information constituting, as they did, but one transaction which involved both of these men, it was proper for the court, where, as in this case, there are two statutes, one or both of which might have been violated, to instruct the jury as to both laws."

The Supreme Court of the state totally ignored the fact that R. R. S. Sec. 2601-2 (P. C. 8887) required additional allegations, over and above R. R. S. 2601 sub-2, and that the additional allegations were not in the information, and that it is not due process of law under the Federal Constitution to convict a person without allegations, that is, without notice; proof, even if it existed is unavailing without allegations.

It was a trial as to neither petitioner.

(e) Although the verdict (R. 49) was in form a verdict of conviction, yet, in law, as the case had been closed, and the defendants had rested, they were at that time entitled to have their guilt or innocence put before a jury properly; and as to E. R. Lindsey, the verdict was directly contrary to what the court charged the jury. And it being a joint trial, it was in law a verdict of acquittal as to both petitioners, and the court erred in adjudging the petitioners guilty (R. 50-52) and the Supreme Court erred also in affirming the judgment of guilty, and not adjudging it a verdict of acquittal.

This question was also raised in the Supreme Court by assignments of error (R. 52-60), where at (R. 55-56) it was claimed:

> "Thus trying two defendants, in one trial, under one information, for two distinct, unrelated crimes, under different statutes, with different penalties, each offense requiring distinct evidence, and neither defendant taking part in the other's offense, and each offense requiring different instructions to the jury, on a distinct state of facts. This cannot be done under our laws and constitution, and neither E. R. Lindsey nor Elbert B. Lindsey can lawfully be convicted under such a condition. There was no jurisdiction as to either."

This question was again raised in the State Supreme Court by assignment (R. 61) as follows:

> "To submit to a trial jury such instructions as hereinbefore set out and direct them to find a verdict of guilty if they find those elements established by the facts, when there has been no information filed, and none of the legal formalities complied with, violates the provisions of the Constitution of the United States in the following particulars:"

Violates Article XIV (14th amendment) wherein it is stated:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property, without due process of law;"

But the State Supreme Court absolutely ignored this question in its opinion, and refused to pass on the same.

B.

The following reasons are here set forth and relied upon for the allowance of this writ of certiorari:

I.

That the sentences in this case (R. 50, 51) are void as being rendered under a law, and in accordance with a law, which took effect after the date of the alleged commission of the offense, and which changed the situation of petitioners to their disadvantage, and lengthened their term of sentence, in contravention of Article 1, Section 10, of the Constitution of the United States.

II.

That the sentences put before the jury and used for impeachment (R. 38, 40) were void for the same reason set out *supra*.

III.

That the convictions on which the judgments and sentences in this case were founded (R. 49) were obtained by the State of Washington, by means and methods which were such a denial of the fundamental rights of petitioners, under the XIV amendment to the Constitution of the United States, as to render them wholly void, in the following particulars:

(a) By the illegal seizing of petitioner Elbert B. Lindsey, without process, and while so being held by police officers and denied the right of counsel, and being held incom-

municado, while ill, by the State of Washington, through an illegal examination by said C. C. Quackenbush, Deputy Prosecutor for the State, put through an examination and coerced into making statements to be used and which were used against both defendants at their trial.

(b) By the State of Washington, in another trial, conducted by said C. C. Quackenbush, the State's officer, obtaining convictions against each of defendants, which were illegal and void, by the direct acts of said Quackenbush, in his misconduct before the trial jury, and then having entered on said convictions, sentences as to each of petitioners which were void, as being rendered under a law which was *ex post facto* as to petitioners, and then before said judgments and sentences could be set aside, using the same to impeach and cast aspersions and unlawful burdens on the testimony of petitioners, when they offered themselves as witnesses; that when said convictions and sentences were first set aside by the Supreme Court of the State, and then such sentences held to be void by the Courts of the United States, and then denying petitioners any opportunity in any court of the State to show the fact that the convictions and sentences were void and illegal, and had been so declared by the courts.

(c) By denying to petitioner Elbert B. Lindsey the right to be represented by counsel at the time of the examination by the State's officer when first seized, and again denying him counsel in all substantial effect by not allowing him counsel until just as the trial started, and denying him the right to consult with counsel and prepare his defense.

(d) By the action of the State at the close of the trial, and the parties had rested, and there was no evidence against E. R. Lindsey under the acts charged in the information, and the State then charging the trial jury as against E. R. Lindsey, under a different statute, which was not

charged in the information and which required additional allegations, with which he had not been charged, and putting to the trial jury as allegations on which they could find him guilty, allegations of acts with which he had not been charged in any information.

(e) That by charging the jury also as to Elbert B. Lindsey, it being a joint trial, on a joint charge, with another statute and another state of facts as to his co-defendant, and then by charging the jury that if they found one defendant guilty of one offense (not charged) and found the other defendant guilty of a different offense, to then find them jointly guilty as charged in the information.

(f) That by entering judgment against E. R. Lindsey, when E. R. Lindsey had challenged the sufficiency of the evidence and the court instructed the jury "that if they did not find him guilty of the offense (not charged in the information) under a different statute, that they should acquit him."

(g) That by entering a judgment against Elbert B. Lindsey on a joint charge, tried with another defendant, and on a joint verdict, when the statutes and acts were several.

(h) That petitioners' rights under the several constitutional provisions and under the procedure adopted was set up in the Supreme Court of the State, was fully claimed, and that court denied the challenged, refused to apply the corrective and refused to protect petitioners rights under the said provisions of the Constitution of the United States.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Washington, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket, No. 26004, the State of Washington, respondent *vs.* Elbert B. Lindsey and E. R. Lindsey, appellants, and that the said judgment of the Supreme Court of the State of Washington may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

ELBERT B. LINDSEY,
E. R. LINDSEY,
*In Propria Personam.*